Kay Farley

Ms. Farley monitors and analyzes congressional and federal government agency activity affecting state court operations, with particular emphasis on funding and children and family-related issues. She is also responsible for informing state court leaders about national activities and assisting in policy development and articulation for the National Center for State Courts (NCSC), Conference of Chief Justices (CCJ), Conference of State Court Administrators (COSCA), National Association for Court Management (NACM), and American Judges Association (AJA). Ms. Farley serves as liaison for the NCSC, CCJ, and COSCA with Congress and federal government agencies on the issues of funding and children and family policy.

Before joining the NCSC, Ms. Farley was Director of MAXIMUS, Inc. and served as Coordinator of Children and Family Programs, Office of Judicial Administration, Kansas Supreme Court.

Open Hearings vs. Child Welfare Confidentiality

BY KAY FARLEY
GOVERNMENT RELATIONS REPRESENTATIVE
OFFICE OF GOVERNMENT RELATIONS
NATIONAL CENTER FOR STATE COURTS

In recent years there has been a growing trend in the states to allow open court hearings on child welfare–related cases. But this practice has clashed with federal requirements for confidentiality on this type of case. While California does not allow open court hearings in child welfare cases, this is a national public policy issue that could affect California courts in the future.

This conflict came to light in 1998 when the Minnesota Supreme Court implemented a pilot project granting judges the discretion to hear child welfare cases in an open court setting. Upon learning of Minnesota's pilot project, the federal Children's Bureau issued a Policy Inquiry Question (ACYF-CB-PIQ-98-01) on June 29, 1998. The PIQ indicated that states allowing open court hearings were in conflict with federal confidentiality requirements, placing their federal child welfare funding in jeopardy.

DIFFERENT PRACTICES

After the PIQ was issued, it became obvious that open court hearings are conducted in a number of states and have been long-standing practice in others. A November 1997 publication by the National Center for Juvenile Justice indicated that 15 states permit or require open court hearings in child welfare cases. The article identified the 15 states as Arizona, Arkansas, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Michigan, Montana, Nebraska, North Carolina, Ohio, Oregon, and Texas. In addition, open court hearings are currently being allowed in New York, Minnesota, and perhaps other states.

Watch on Washington

The Children's Bureau's PIQ references the following statutory requirements:

▲ Section 471(a)(8) of the Social Security Act requires that states provide safeguards to restrict the use and/or disclosure of information regarding children receiving Title IV-E foster care and adoption assistance.

▲ Section 106(b)(2)(A)(v) of the Child Abuse Prevention and Treatment Act (CAPTA) requires states to preserve the confidentiality of all reports and records on child welfare cases to protect the privacy rights of the child and the child's parents or guardians, except under limited circumstances, and prohibits disclosure of confidential information to persons or entities other than those enumerated in the statute.

▲ Section 106(b)(2)(A)(vi) of CAPTA specifies that the only exception to the disclosure restrictions is in cases of child abuse or neglect that result in the death or near death of a child.

Based on these statutes, the Children's Bureau has issued federal regulations and PIQs that further dictate state policy and practice.

REEXAMINING THE ISSUE

In August 1998, Carol Williams, then–Assistant Commissioner of the Children's Bureau, met with the Conference of Chief Justices/Conference of State Court Administrators' Courts, Children, and Family Committee. At that time she indicated a willingness to reexamine the issue. The Children's Bureau then pulled together a small discussion group of judges and child welfare administrators to examine current practices and the implications for children's privacy rights of open court hearings. The discussion group met March 12–13, 1999. Iowa and Minnesota representatives discussed their experience with open court hearings. Representatives from Missouri and North Carolina described their practices for closed court hearings.

The discussion focused on the following questions:

? What information is disclosed in the open court hearings? Who discloses the information? When is the disclosure made?

? Are all proceedings open or only certain hearings?

? Do open hearings affect the accountability of the system regarding agencies, courts, parents, and delinquents?

? How have the media responded to open hearings?

? In an open hearing environment, what is necessary to protect the privacy rights of children?

? What is the role of the community? Do open hearings affect community standards, ownership, and education?

? What evaluations have been done or are planned related to open court hearings?

? What is the impact of the closure of executive branch records on the quality of services?

NOT NECESSARILY NEGATIVE

The general consensus at the end of the discussion was that open court hearings do not necessarily affect children's privacy rights negatively and can have a positive impact on the handling of child welfare cases. Through open court hearings, the child welfare system can be held more accountable, and the public can be better educated about the needs of the child welfare system. Allowing judges the discretion to close individual hearings based on the circumstances of the case and the needs of the particular child can protect children's privacy rights. Educating the media on the impact that disclosure of the identity of the children and families can have on the children can also help protect children's privacy rights.

Federal officials are constrained by their interpretation of current law, but states currently allowing open court hearings are not expected to be financially sanctioned in the near future. CAPTA will be up for reauthorization in 2000. At that time, CAPTA could be amended to allow states the option of open court hearings in these cases. The NCSC Government Relations Office will be closely monitoring this issue over the next year.

The Government Relations staff will be rotating the writing assignment, so you will get a chance to meet each of them. If any of these columns prompt questions, feel free to call or e-mail the author. For this column, please direct comments to Kay Farley at kfarley@ncsc.dni.us or 800-532-0204. ■

Task Force on Quality of Justice

Council Receives Civil ADR Recommendations

The Report of the Task Force on the Quality of Justice, Subcommittee on Alternative Dispute Resolution (ADR) and the Judicial System has made several recommendations to maximize ADR's positive effects and minimize its negative effects through means within the judicial branch's general domain. The Judicial Council received the subcommittee's report at the council's August 27 business meeting.

The recommendations include measures to encourage more voluntary use of ADR, particularly mediation, outside the courts and more opportunities for early mediation within the courts. The subcommittee also addressed ethical concerns, recommending the adoption of ethical standards and the strengthening of enforcement mechanisms for court-related ADR providers. In addition, it proposed specific statutes and rules relating to concerns about court references, particularly in discovery matters.

The council approved referral of the subcommittee's recommendations on proposed legislation and rules of court to appropriate internal council committees for consideration and other recommendations to staff for action as directed.

REFORM IN PROGRESS

"ADR, as it relates to the judicial system, is a reform in progress," wrote University of San Francisco Law School Professor Jay Folberg, subcommittee chair, in the report's foreword. "We believe that our recommendations, if adopted, will encourage party selection of the most appropriate dispute resolution process, thus increasing satisfaction for those who seek resolution of their disputes. To the extent that these recommendations improve court-connected ADR programs and court referrals, they will enhance public perception of the courts."

Making the presentation to the council were Professor Folberg; retired Judge Darrel Lewis, vice-chair; and Santa Clara University School of Law Professor Gerald Uelmen. The three are among the 20 persons who make up the task force appointed by Chief Justice Ronald M. George in 1998 to assess and make recommendations regarding the effects of ADR on courts, litigants, and the public; ethical issues; and court referral of disputes.

● Contact: For information or a copy of the Report of the Task Force on the Quality of Justice Subcommittee on Alternative Dispute Resolution and the Judicial System, Heather Anderson, Attorney, Office of the General Counsel, Council and Legal Services, 415-865-7691. The report is also available on the California Courts Web site at www.courtinfo.ca.gov/reference/. ■

Courts May Grant *Romero* Relief Count by Count

BY JUDGE J. RICHARD COUZENS
SUPERIOR COURT OF PLACER COUNTY

In exercising its discretion to dismiss prior strikes under Penal Code section 1385, courts may grant the motion as to some counts and deny the motion as to other counts. Courts are not required to treat all current convictions with perfect symmetry, thus requiring judges to either grant or deny a motion to dismiss prior strikes as to every conviction in the current proceeding, when to do so would create an unjust sentence. Courts are entitled to treat each count separately under the three-strikes law. (*People v. Garcia* (1999) 21 Cal.4th 1 [99 Daily Journal D.A.R. 5235].)

The facts of *Garcia* are instructive. Defendant was convicted in 1996 of two counts of residential burglary. He previously had been convicted of five residential burglaries in a single proceeding in 1991. The trial court found it inappropriate to dismiss all of the strikes as to all of the counts, but did grant the motion as to all of the strikes applicable to one of the counts. The trial court based its decision on the fact that the prior burglaries were committed during a single period of aberrant behavior, that defendant received only a single prison term, that he had no record of violence, and that he cooperated fully with the police in both the present and prior cases. The trial court sentenced the defendant on one count under the three-strikes law and imposed a traditional determinate sentence on the other count.

CONVICTION NOT WIPED OUT

The Supreme Court observed that in granting a motion under section 1385, the trial court is not "wiping out" the conviction as if it had never happened. "Rather, the conviction remains a part of the defendant's personal history, and a court may consider it when sentencing the defendant for other convictions, including others in the same proceeding." (*Id.* at p. ___.)

While a court may wish to treat multiple current felonies differently because one may be more serious than another, such differences are not required before the court may dismiss strikes as to one count and not others. "Even if the current offenses are virtually identical, a defendant's 'prospects' [citation omitted] will differ greatly from one count to another because a Three Strikes sentence on one count will itself radically alter those prospects." (*Id.* at p. ___.)

SENTENCE A CONSIDERATION

The court found that "a defendant's sentence is . . . a relevant consideration when deciding whether to strike a prior conviction allegation; in fact, it is the overarching consideration because the underlying purpose of striking prior conviction allegations is the avoidance of unjust sentences." (*Id.* at p. ___.)

"Though a defendant's prior conviction status does not change from one count to another, and though it is appropriate to allege that status only once as to all current counts, *the effect under the Three Strikes law* of a defendant's prior conviction status may change from one count to another." (*Id.* at p. ___; emphasis in original.)

Since the defendant will receive strike punishment for at least one count and since the prior convictions have not been entirely removed from the case, courts should still observe other sentencing restrictions imposed by the three-strikes law. For example, the court must apply the rules discussed in *Hendrix*, *Deloza*, and *Durant* regarding consecutive and concurrent sentencing. (*People v. Hendrix* (1997) 16 Cal.4th 508; *People v. Deloza* (1998) 18 Cal.4th 585; *People v. Durant* (1999) 68 Cal.App.4th 1393.) Since the defendant in Garcia was convicted of multiple residential burglaries, crimes not committed on "the same occasion" and not arising from "the same set of operative facts," the law required that the defendant receive a consecutive sentence for the convictions. In other words, just because one or more counts will receive a traditional term of imprisonment does not justify the abandonment of the other sentencing rules imposed by the three-strikes law.

CAUTION URGED IN APPLICATION

Courts must be cautious in applying *Garcia* to multiple-count cases. *Garcia* does not provide justification for ignoring the application of the three-strikes law to a particular count without first finding that the law properly should apply to a portion of the case, and that articulable reasons exist under *Romero* and *Williams*, based on the sentence as imposed, that justify the granting of the motion with respect to other portions of the case. (*People v. Superior Court (Romero)* (1995) 40 Cal.App.4th 183; *People v. Williams* (1995) 37 Cal.App.4th 1737.)

Properly applied, *Garcia* gives courts considerable additional discretion in fashioning a prison sentence to meet the circumstances of each defendant. Rather than being forced in all cases to impose a multicount consecutive sentence that would span generations, judges may now impose a prison term that will give a deserving defendant some hope of living to survive it. ■

Judge J. Richard Couzens

Judge Couzens is a member of the Judicial Council and past chair of its Criminal Law Advisory Committee.

Study Leads to Court Interpreter Reforms

The Judicial Council at its July business meeting approved a number of recommendations resulting from a court interpreter study contracted by the Administrative Office of the Courts (AOC) staff at the council's request and sent one recommendation back for further study. The first phase of the study and the resulting recommendations covered interpreter compensation, testing, and certification. The second phase will study working conditions, recruitment, retention of qualified interpreters, and other issues.

The council referred back to staff and the Court Interpreters Advisory Panel for further analysis and research the issue of payment of interpreting services by other state and federal public agencies when a court cancels an assignment and pays a cancellation fee and the interpreter obtains work from another public agency for the same time period.

The following recommendations were approved by the council:

Model Contract

- Direct the AOC to develop model contract language.
- Direct the AOC to seek legal analysis on a statewide and regional contract and the potential legal implications under Internal Revenue Service (IRS) guidelines and to submit to the council the legal analysis and recommendation on such a contract.

Testing and Certification

- Continue to pursue efforts to join the nationwide Consortium for State Court Interpreter Certification.
- Delay designating additional languages for certification until the completion in 2000 of the mandated study on language needs.
- Recognize federally certified interpreters as certified in California, subject to certain conditions.
- Direct the AOC to work to reduce examination and certification fees.

Compensation Rates for Contract Interpreters

- Direct the Administrative Director of the Courts to set compensation rates for contract interpreters based not on languages or regional cost-of-living differences; however, grant authority to local courts to establish a differential rate if an interpreter works in multiple languages during the same full- or half-day assignment.

Other Compensation Issues For Contract Interpreters

- Formalize the definitions of full- and half-day assignments.
- Direct the AOC to seek legal analysis on an overtime policy and the potential legal implications under IRS guidelines and to submit to the council the legal analysis and recommendation on an overtime policy.
- Support local trial court discretion in requiring interpreters to remain on site until the completion of the full or half day.
- Direct the AOC to seek legal analysis on mileage reimbursement and compensation for travel time and the potential legal implications under IRS guidelines and to submit to the council the legal analysis and recommendation regarding such reimbursement.

Compensation for Staff Interpreters

- Require state certification of all staff interpreters.
- Link rates for staff interpreters to other court employees' salaries and reflect competitive pay practices.
- Reimburse staff interpreters at the prevailing local rate for travel expenses incurred outside their normal commute.
- Direct the AOC to examine the use of an exclusive agency for statewide coordination of interpreter services and to report to the council when an appropriate agency exists.

● Contact: For more information, Joseph Wong, Coordinator, Court Interpreters Program, Trial Court Services, 415-865-7606. Also visit the Court Interpreters Program Web site, www.courtinfo.ca.gov/programs/courtinterpreters/. ■

Nominations Due Oct. 25 For Access to Justice Award

Nominations are due by October 25 for the Benjamin Aranda III Access to Justice Award. Named for the Los Angeles jurist known for his tireless efforts to promote fairness and access in the courts, the award annually honors a California trial judge or appellate justice for his or her efforts to improve access to the judicial system for poor or low-income persons.

The award is made jointly by the Judicial Council, the State Bar, and the California Judges Association. It will be presented at the California Judicial Administration Conference in January 2000 in San Francisco.

The award was developed by the Bench-Bar Pro Bono Project, whose mission is to educate the bar and the judiciary about the causes of and solutions for the lack of access to the courts.

● Contact: For information and nomination forms, Arline S. Tyler, Attorney, Office of the General Counsel, Council and Legal Services, 415-865-7671; or Pauline Weaver, Chair, Bench-Bar Pro Bono Project Advisory Committee, 510-795-2620.

Master Insurance Policy For Judicial Officers

The Judicial Council at its July business meeting authorized the purchase of an insurance policy for the defense of justices, judges, commissioners, and referees in proceedings before the Commission on Judicial Performance (CJP).

Following are answers to frequently asked questions about the new insurance program.

Take Note

For more information about the Commission on Judicial Performance, contact its office at 455 Golden Gate Ave., Suite 14400, San Francisco, CA 94102-3660, 415-557-1200. For the commission's Policy Declarations, go to www.courtinfo.ca.gov/reference/5_judges.htm#Commission on Judicial Performance Policy Declarations. For the commission's rules, go to www.courtinfo.ca.gov/reference/5_judges.htm#Commission on Judicial Performance Rules. The California Code of Judicial Ethics is available at www.courtinfo.ca.gov/rules/1999/appendix/judethic.pdf.

Q: When does the insurance program take effect?

A: The program will take effect September 15, 1999. A letter of notification will be sent to all justices, judges, commissioners, and referees at that time.

Q: Who is the insurance carrier?

A: The insurance underwriter is Lloyd's of London. Administration of the policy is through Herbert L. Jamison & Co., LLC, and Mendes & Mount, LLP, a New York law firm. Jamison and Mendes & Mount were selected by Lloyd's to administer the policy.

Q: What does the insurance policy cover?

A: The policy is limited to the payment of attorney fees for the defense of judicial officers in CJP proceedings only. Types of conduct resulting in an advisory letter or discipline by the CJP include abuse of contempt/sanctions; bias, appearance of bias (not directed toward a particular class); bias, appearance of bias toward a particular class; off-bench abuse of office; improper business activities; sexual harassment, inappropriate workplace, gender-related conduct; gifts, loans, favors; and non-substance-abuse criminal conduct.

Q: What are the policy terms?

A: The policy offers the following terms:

- Limits of $1 million per claim, per judge, and $2 million annual aggregate;
- No deductible;
- Defense provided by panel counsel or other counsel approved by Mendes & Mount; and
- Upon retirement or resignation, a tail extension option is available: judges who retire or resign during the policy term may purchase an additional six years of coverage for an additional premium of $100, with an option to renew for an additional six years, for an additional $100 premium. In the event of death or permanent and total disability that necessitates retirement, the tail coverage is free.

Q: What is the authority for the Judicial Council to purchase such insurance for judicial officers?

A: The purchase of insurance is authorized by statute. Government Code sections 995.4 and 996 state:

995.4. A public entity may, but is not required to, provide for the defense of:

(a) An action or proceeding brought by the public entity to remove, suspend or otherwise penalize its own employee or former employee, or an appeal to a court from an administrative proceeding by the public entity to remove, suspend or otherwise penalize its own employee or former employee.

(b) An action or proceeding brought by the public entity against its own employee or former employee as an individual and not in his official capacity, or an appeal therefrom.

996. A public entity may provide for a defense pursuant to this part by its own attorney or by employing other counsel for this purpose or by purchasing insurance which requires that the insurer provide the defense.

Q: How do judicial officers qualify for coverage?

A: The state's approximately 2,000 judicial officers may elect to receive this coverage. To be eligible, they must complete a required Judicial Council–sponsored educational program developed in collaboration with the CJP and the California Judges Association. They will be required to complete the training—which is separate from any other educational programs currently offered—at a designated time within a three-year period, beginning December 31, 1999, and once every three years thereafter.

Q: What will the educational program cover?

A: It will provide a unique opportunity for all judicial officers to focus on relevant subject areas, such as ethics, elimination of bias, and employment issues, in order to prevent conduct that has historically resulted in complaints before the CJP.

Q: What happens if judicial officers do not complete the educational program within the designated time period?

A: They will be required to refund all premium amounts paid on their behalf for each year they were covered by the policy.

Q: How cost-effective is a master insurance policy?

A: About one-third of the state's judicial officers currently are covered under policies paid for by themselves or their courts. For coverage of defense in CJP proceedings, these policies cost $1,000 and include a $2,500 deductible. The master policy offered by the Judicial Council will provide across-the-board coverage for all the state's judicial officers and cost an average of $441 per policy with no deductible. Thus, the master policy will ensure coverage for judicial officers at significant cost savings over locally funded purchases.

Q: What are other benefits of a master insurance policy?

A: The insurance program will provide for uniform statewide defense of judges in CJP proceedings. It will support a strong disciplinary system for the state's judicial officers and promote effective risk management practices. In addition, judicial officers will have the opportunity to seek advice to further ensure strict adherence to the canons of judicial ethics and the integrity of the judiciary. By promoting education and sound risk management practices and providing for the uniform statewide defense of judges, the master insurance program will benefit the public and the courts and improve the quality of justice in California.

Q: What other states offer such coverage?

A: Besides California, no other states that we know of combine risk management practices (including the mandatory training component) with coverage for defense in CJP proceedings. Some states, however, pay for the defense of judges, and a few states, such as Ohio, Vermont, and Massachusetts, provide comprehensive insurance coverage for judges, including for CJP proceedings.

● Contact: For more information and answers to other questions, Annemarie O'Shea, Attorney, 415-865-7686, or Starr Babcock, Managing Attorney, 415-865-7710, both in the Office of the General Counsel, Council and Legal Services. ■

More Help

The Judicial Council at its July business meeting approved the establishment of the Judicial Officers Assistance Program (JOAP). Effective August 1, 1999, the JOAP provides judicial officers and their families with the benefit of confidential, professional counseling and referral services in specific subject areas. The JOAP counseling and consultation services are designed to address issues such as marital and family problems, alcohol and drug dependency, child and elder care, retirement planning, and interpersonal conflicts.

Those eligible for the JOAP include all judicial officers and subordinate judicial officers, their spouses, and their dependents age 23 and younger.

The Administrative Office of the Courts' Human Resources Bureau administers the plan. Information about the program will be sent to all judicial officers.

● Contact: For information, Rochelle S. Terrell, Human Resources Bureau, 415-865-4262. ■

Courts to Be Aided by Performance Standards

Where are we now? Where do we want to go? Are we making progress?

These are the questions that the trial court performance standards (TCPS), contained in section 30 of the Standards of Judicial Administration, are intended to help courts answer.

At its August business meeting, the Judicial Council, upon the recommendation of the Trial Court Presiding Judges and Court Executives Advisory Committees, voted to retain section 30 on the TCPS measurement system. It also voted to encourage the trial courts to implement Level One (15 measures) and Level Two (14 additional measures) of the streamlined TCPS measurement system for self-assessment and guidance in local planning efforts.

AUTOMATED HELP SOUGHT

To assist courts in implementing the streamlined system, the council authorized the Administrative Office of the Courts (AOC) to seek funding to enable courts to use an automated survey system to provide reports containing data and analyses for each survey.

In addition, the AOC will provide programs for trial courts on TCSPS implementation and authorize the Center for Judicial Education and Research to explore incorporating TCPS measurement system education at appropriate training sessions. Finally, the council authorized distribution of *The Essentials of Trial Court Performance—A Handbook for California Courts, December 1998* to all trial courts and directed the AOC to maintain a database of experiences to facilitate the exchange of information and a long-term evaluation of trial courts' implementation of the TCPS measurements.

● Contact: For information, Francine Collier, Trial Court Services, 415- 865-7612. ■